No. 88-1856

Supreme Court, U.S.
FILED
MAY 19 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1988

LOUISIANA DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT

PETITIONER

V.

NICK MARTINOLICH, INC., ET AL,

RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF LOUISIANA, FIRST CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BRIEF FOR RESPONDENT

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TABLE OF AUTHORITIES

Rules, Statutes and Constitutional Provisions	Pages
23 U.S.C. § 409	2, 3, 4
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STATUTE AT ISSUE BEFORE THE COURT

A. 23 U.S.C. § 409: **ADMISSION AS EVIDENCE OF CERTAIN REPORTS AND SURVEYS:**

> "Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled for the purpose of identifying (F.N. 1) evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to Sections 130, 144 and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-Aid Highway Funds shall not be admitted into evidence in Federal or State Court or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data."

APPENDIX

A. Respondents' Motion to Compel and Memorandum in support A-1

B. Respondents' Writ Application to the Louisiana First Circuit Court of Appeal A-12

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D. Respondents' Opposition Brief to State of Louisiana's Writ Application to the Louisiana Supreme Court A-41

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STATEMENT OF THE CASE

On or about November 1, 1980, Russel C. Benoit, II, while driving a cane truck in the course and scope of his employment for Nick Martinolich, Inc. was involved in a collision with a train owned and operated by Southern Pacific Transportation Company at the intersection of Louisiana Highway 3185 and Southern Pacific's Railroad Crossing, approximately two miles from the intersection of Louisiana Highway 1 on the outskirts of Thibodaux, Louisiana.

Russel C. Benoit, II was headed north on Louisiana Highway 3185, carrying a full load of sugar cane. The Southern Pacific train was traveling east, pulling boxcars loaded with refined sugar. At the time of the accident, there were no posted stop signs, flashing signals, lights, bells or gate arms. The only marker present was a standard cross-buck.

At the time of the accident, there were fields of sugar cane, which were standing on either side of the tracks, and which obscured the vision of Russel C. Benoit, II, as to the approaching train.

As a result of the above-described accident, Nick Martinolich filed suit against Southern Pacific Transportation Company, the Louisiana Department of Transportation and Development, Robert N. Figel and Daniel Underwood for damage to the tractor and trailer and for loss of use of the tractor and trailer. Subsequently, Southern Pacific Transportation Company filed suit in the United States District Court, Eastern District of Louisiana, against Nick Martinolich, Russel C. Benoit, II and American Mutual Liability Insurance Company. This suit was subsequently transferred and consolidated with the suit filed by Nick Martinolich.

Respondents, American Mutual Liability Insurance Company, Nick Martinolich and/or Nick Martinolich, Inc. and Russel C. Benoit, II filed a Third-Party Demand against the State of Louisiana through the Department of Transportation and Developments, alleging that it failed to properly warn approaching motorists with regard to this particular train crossing.

SUMMARY OF ARGUMENT

23 U.S.C. § 409 does not create a privilege as to the documents, reports, surveys, schedules, lists, or data compiled pursuant to it. 23 U.S.C. § 409 also does not prevent this information from discovery pursuant to Louisiana Code of Civil Procedure Article 1422.

23 U.S.C. § 409 deals exclusively with the admissibility of "reports, surveys, schedules, lists, or data compiled". The statute in no way limits testimony or discovery regarding the identity, evaluation, or actions taken regarding planning the safety enhancement of potential accident sites.

Respondent seeks discovery from the State of Louisiana through the Department of Transportation and Development not to establish that a defective condition existed at this railway-highway crossing, but to establish that the Department of Transportation and Development was negligent in implementing its procedure for evaluating railway-highway crossings.

The discovery sought from the State of Louisiana through the Department of Transportation and Development is reasonably calculated to lead to the discovery of information which will be admissible.

ARGUMENT

The above entitled and numbered cause is brought before this Honorable Court on a Writ of Certiorari by the State of Louisiana through the Department of Transportation and Development. The Writ Application has been brought in response to the denial of Writs by the Louisiana Supreme Court on January 6, 1989. The issue before the trial court, Louisiana First Circuit Court of Appeal, Louisiana Supreme Court, and this Honorable Court, involves the interpretation of 23 U.S.C. § 409 which provides:

> "Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled for the purpose of identifying[,] evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossing, pursuant to Sections 130, 144 and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-Aid Highway Funds shall not be admitted into evidence in Federal or State Court or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data."

Respondents submit that the First Circuit Court of Appeal correctly determined that the trial court clearly erred in finding that 23 U.S.C. § 409 created a privilege which made all information collected non-discoverable. The Louisiana First Circuit Court of Appeal issued an eleven page opinion

which fully addresses the issues of construction, interpretation and application of the Federal Statute in question. As pointed out by the Louisiana First Circuit Court of Appeal, "the documents made inadmissible by 23 U.S.C. § 409 are not 'all information gathered . . .' as the trial court held, but rather 'reports, surveys, schedules, lists or data compiled . . .' ". It is submitted to this Court that 23 U.S.C. § 409 clearly and unambiguously deals with the admissibility of documentary evidence. The statute in no way limits testimony or discovery regarding the identity, evaluation or actions taken regarding planning the safety enhancement of potential accident sites. Nowhere is the word "privileged" used and nowhere in the statute is there any suggestion that the reports and surveys discussed in the statute are not discoverable.

Respondents do not seek to discover information from the State of Louisiana through the Department of Transportation and Development prior to the accident in order to prove that a negligent or hazardous condition existed at the time of the accident. Respondents seek this information to establish that the State of Louisiana through the Department of Transportation and Development was negligent in implementing its procedure for evaluating railway-highway crossings, and, therefore, this particular crossing failed to receive the proper additional warning signals, devices, et cetera, when it should have.

It is further suggested to the Court that the Louisiana First Circuit Court of Appeal correctly found that "the reports, surveys, data, schedules and lists collected pursuant to 23 U.S.C. § 130, 144, and 152, made inadmissible by 23 U.S.C. § 409, are not privileged within the meaning of LSA - C.C.P. Art. 1422, and 23 U.S.C. § 409 does not displace our Code of Civil Procedure as to make them privileged."

Respondents submit that the discovery of the information in the possession of the State of Louisiana through the Department of Transportation and Development with regard to this particular crossing is reasonably calculated to lead to the discovery of information which will establish that the State of Louisiana through the Department of Transportation and Development was negligent in its evaluation of this particular crossing which information will be admissible.

CONCLUSION

WHEREFORE, respondents, American Mutual Liability Insurance Company, Nick Martinolich and/or Nick Martinolich, Inc. and Russel Benoit, II pray that the application of the State of Louisiana through the Department of Transportation and Development for Certiorari, be denied.

Respectfully Submitted,

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Counsel for Respondents

PROOF OF SERVICE

The undersigned, counsel for the Respondents, American Mutual Liability Insurance Company, Nick Martinolich, Inc. and Russel Benoit, II, and a member of the Bar of the Supreme Court of the United States, hereby certifies that 3 copies of the foregoing Opposition Brief of the Respondents and Appendix have been served by depositing same in a United States mailbox with postage prepaid, addressed to:

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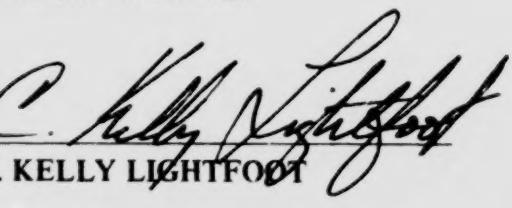
BY: 
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APPENDIX

No. 88-1856

In The
Supreme Court of the United States

October Term, 1988

LOUISIANA DEPARTMENT OF TRANSPORTATION
AND DEVELOPMENT

PETITIONER

V.

NICK MARTINOLICH, INC., ET AL,

RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF APPEAL OF LOUISIANA, FIRST CIRCUIT

APPENDIX TO RESPONDENTS BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Counsel for Respondents, American Mutual Liability Insurance Company, Nick Martinolich, Inc. and Russel Benoit, II

EXHIBIT A

Respondents' Motion to Compel and Memorandum in Support

17th JUDICIAL DISTRICT COURT FOR THE PARISH OF LAFOURCHE

STATE OF LOUISIANA

NO. 44,698

NICK MARTINOLICH

VERSUS

SOUTHERN PACIFIC TRANSPORTATION COMPANY, ET AL.

(CONSOLIDATED WITH)

NO. 46, 788

SOUTHERN PACIFIC TRANSPORTATION COMPANY

VERSUS

NICK MARTINOLICH, ET AL.

_____ _____

FILED **DEPUTY CLERK**

MOTION TO COMPEL

COMES NOW, through undersigned counsel, American Mutual Liability Insurance Company, Nick Martinolich, Russell Benoit, III, and Southern Pacific Transportation Company, and on suggesting to the Court that the depositions of the listed experts of the Department of Transportation and Development, Lawrence Harry and Joseph Wax, were taken on July 13, 1987.

That counsel for the Department of Transportation and Development objected to any questions regarding the hazard rating system or "prioritizing" for the Southern Pacific Transportation Company railroad crossing at its intersection with Louisiana Highway 3185. Counsel for the Department of Transportation and Development instructed the expert witnesses not to answer any questions in this regard and thereby seriously hendered the ability of counsel for American Mutual Liability Insurance Company from conducting a discovery deposition.

Movers request that the Court issue an order compelling Lawrence Harry and Joseph Wax to re-appear for their depositions and respond to questions concerning the hazard rating system or the "prioritizing" system employed by the Department of Transportation and Development for reasons more fully set forth in the Memorandum in Support of Motion to Compel attached hereto.

Metairie, Louisiana this 6 day of August, 1987.

Respectfully Submitted,

HAILEY, McNAMARA, HALL,
LARMANN & PAPALE

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Tel: 504-834-9252
Attorneys for American Mutual Liability Insurance Company, Nick Martinolich and Russell Benoit, III

ORDER

IT IS ORDERED that the Department of Transportation and Development show cause on the 9th day of September, 1987, at 10:00 o'clock a.m., why it should not be compelled to re-produce Lawrence Harry and Joseph Wax for their depositions, why Lawrence Harry and Joseph Wax should not be ordered to respond to questions concerning the hazard rating system or the "prioritizing" system employed by the Department of Transportation and Development, why sanctions and attorney's fees should not be assessed against the Department of Transportation and Development for unreasonably instructing its listed expert witnesses not to respond to movers' questions, and why the Department of Transportation and Development should not be assessed attorney's fees and costs incurred by movers in bringing this motion and all reasonable expenses incurred in re-taking the depositions of Lawrence Harry and Joseph Wax.

s/s M. F. Falgout
JUDGE

PLEASE SERVE

Department of Transportation
and Development
Through its attorney of record,
PATSY COOPER, ESQ.
Post Office Box 44245
1201 Capitol Annex Drive
Baton Rouge, LA 70804

CERTIFICATE OF SERVICE

I do hereby certify that I have on this 6 day of August, 1987, served a copy of the foregoing pleading on counsel for all parties to the proceeding, by mailing the same by United States Mail, properly addressed and first class postage prepaid.

s/s C. Kelly Lightfoot

FILED
AUG 10 1987
s/s Tara A. Cheramie
CLERK OF COURT
(stamp)

A TRUE COPY
Clerk of Court's Office
Thibodaux, La. Aug 20, 1987
s/s (illegible)
Clerk of Court
(stamp)

17th JUDICIAL DISTRICT COURT
FOR THE PARISH OF LAFOURCHE

STATE OF LOUISIANA

NO. 44,698

NICK MARTINOLICH

VERSUS

SOUTHERN PACIFIC TRANSPORTATION COMPANY, ET AL.

(CONSOLIDATED WITH)

NO. 46,788

SOUTHERN PACIFIC TRANSPORTATION COMPANY

VERSUS

NICK MARTINOLICH, ET AL.

_____ _____

FILED DEPUTY CLERK

MEMORANDUM IN SUPPORT OF MOTION TO COMPEL

MAY IT PLEASE THE COURT:

The depositions of the Department of Transportation and Development experts were taken on July 13, 1987 in Lafayette and Baton Rouge. Counsel for the Department of

Transportation and Development, Pasty Cooper, objected to any questions regarding the hazard rating system or "prioritizing" system which the Department of Transportation and development has for evaluating the need for safety enhancement at railway-highway crossings.

Counsel for the Department of Transportation and Development based her objection on 23 USC Section 409 which provides as follows:

> Section 409. Admission as evidence of certain reports and surveys.
>
> "Not withstanding any other provision of law, reports, surveys, schedules, lists, or data compiled for the purpose of identifying (FN 1) evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-Aid highway funds shall not be admitted into evidence in Federal or State Court or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data."

FN 1 - probably should have a comma inserted.

Mr. Joseph Wax was questioned concerning his knowledge of what persons within the Department of Transportation

and Development would have knowledge of the hazard rating system or prioritizing" system in 1979 and 1980 as follows:

> By Mr. Lightfoot:
>
> Q: "Mr. Wax, would Mr. Morgan have been the individual with that knowledge in 1979 and 1980?"
>
> Ms. Cooper:
>
> "I'm going to object to that. I really am going to object to any other questions along the line of anything pertaining to a priority list on updating railroad crossings."
>
> Mr. Lightfoot:
>
> "We are going to be wasting a lot of time, because we are going to have to go into Court and get a ruling on that."
>
> Ms. Cooper:
>
> "That is what I'm expecting."
>
> Mr. Gomila:
>
> "Well, we will come back at your expense. Let's go." (Depo of Joseph Wax, page 12, lines 19-25; page 13, lines 1-12).

Counsel for the Department of Transportation and Development again instructed Mr. Joseph Wax not to answer the following question:

By Mr. Gomila:

Q: "Who makes the decision as to whether or not safety devices or additional safety devices, such as lights and the like, are needed at a particular crossing?"

Ms. Cooper:

"I object to that as again, coming under title 23 USC.."

Under Louisiana Code of Civil Procedure Article 1422, discovery is broadly construed to include anything reasonably calculated to lead to the discovery of admissible evidence. Louisiana Code of Civil Procedure Article 1422 provides:

Art. 1422. Scope of discovery; in general

"Unless otherwise limited by order of the Court in accordance with this Chapter, the scope of discovery is as set forth in this Article and in Articles 1423 through 1425. Parties may obtain discovery regarding any matter, not priviledged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. *It is not ground for objection that the information sought will be*

> *inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.*"
> (Emphasis added).

The provision relied upon by counsel for the Department of Transportation and Development, 23 USC Section 409 is entitled "Admission as Evidence of Certain Reports and Surveys." This statue clearly and unambiguously deals with the admissibility of documentary evidence. The statute in no way limits testimony regarding the identity, evaluation or actions taken regarding planning the safety enhancement of potential accidents sites.

The crux of movers' case against the Department of Transportation and Development is establishing that the Department of Transportation and Development had prior knowledge that this was a dangerous crossing in need of additional warning signals and devices. To construe 23 USC Section 409 to prohibit movers from discovering and putting on testimony regarding the Department of Transportation and Development's actions with regard to the evaluation of this crossing in terms of a "hazard rating" and its need for additional warning signals or devices is to grant the Department of Transportation and Development a blanket immunity, which the legislature clearly has not done.

Based on the above and foregoing, movers request that the Court issue an order compelling Lawrence Harry and Joseph Wax to re-appear for their depositions and respond to questions concerning the hazard rating system or the "prioritizing" system employed by the Department of Transportation and Development.

Movers further request sanctions and attorney's fees against the Department of Transportation and Development for unreasonably instructing its listed expert witnesses not to respond to movers questions; movers further request attorney's fees and costs incurred in bringing this motion and all reasonable expenses incurred in re-taking the depositions of Lawrence Harry and Joseph Wax.

Respectfully Submitted,

HAILEY, McNAMARA, HALL,
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Attorneys for Southern Pacific Transportation Company

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing pleading has been served upon opposing counsel of record, by placing a copy of same in the United States mail, properly addressed and first class postage prepaid, this 6 day of August, 1987.

s/s C. Kelly Lightfoot

FILED
AUG 10 1987
s/s Tara A. Cheramie
DEPUTY CLERK OF COURT
(stamp)

A-12

EXHIBIT B

COURT OF APPEAL

FIRST CIRCUIT

STATE OF LOUISIANA

NO. 88 CW0159

NICK MARTINOLICH

VERSUS

SOUTHERN PACIFIC TRANSPORTATION COMPANY, ET. AL.

(CONSOLIDATED WITH)

SOUTHERN PACIFIC TRANSPORTATION COMPANY

VERSUS

NICK MARTINOLICH, ET. AL.

COURT OF APPEAL FIRST CIRCUIT
Filed
JAN 26 1988
s/s Stanley F. Lemoine
Clerk
(stamp)

APPLICATION FOR SUPERVISORY WRITS
OF PROHIBITION, CERTIORARI, MANDAMUS AND
REVIEW TO THE HONORABLE COURT OF APPEAL,
FIRST CIRCUIT, STATE OF LOUISIANA

Respectfully Submitted,

HAILEY, McNAMARA, HALL,
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RECEIVED
JAN 29 1988
(stamp)

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COURT OF APPEAL

FIRST CIRCUIT

STATE OF LOUISIANA

NO. 88-CWO159

NICK MARTINOLICH

VERSUS

SOUTHERN PACIFIC TRANSPORTATION COMPANY, ET. AL.

(CONSOLIDATED WITH)

SOUTHERN PACIFIC TRANSPORTATION COMPANY

VERSUS

NICK MARTINOLICH, ET. AL.

APPLICATION FOR SUPERVISORY WRITS OF PROHIBITION, CERTIORARI, MANDAMUS AND REVIEW TO THE HONORABLE COURT OF APPEAL, FIRST CIRCUIT, STATE OF LOUISIANA

The application of American Mutual Liability Insurance Company, Nick Martinolich and/or Nick Martinolich, Inc., and Russell Benoit, II in these proceedings entitled "Nick Martinolich v. Southern Pacific Transportation Company, et al. (consolidated with) Southern Pacific Transportation

Company v. Nick Martinolich, et al.," Nos. 44,698 and 46,788, Division "C", 17th Judicial District Court for the Parish of LaFourche, State of Louisiana, applying for Supervisory Writs directed to respondents, Louisiana Department of Transportation and Development and the Honorable Wollen J. Falgout, Judge, Division "C", 17th Judicial District Court, Parish of LaFourche, State of Louisiana, respectfully represents that:

II. *STATEMENT OF GROUNDS ON WHICH JURISDICTION OF THE COURT IS INVOKED*

The Jurisdiction of this Court is invoked in accordance with Article V, Section 10 of the Louisiana Constitution, Article 2201 of the Louisiana Code of Civil Procedure and Rule 4 of the Uniform Rules of The Court of Appeal.

III. *STATEMENT OF THE CASE*

On or about November 1, 1980, Russell C. Benoit, II, while driving a cane truck in the course and scope of his employment for Nick Martinolich, Inc. was involved in a collision with a train owned and operated by Southern Pacific Transportation Company at the intersection of Louisiana Highway 3185 and Southern Pacific's railroad crossing, approximately two miles from the intersection of Louisiana Highway 1 on the outskirts of Thibodaux, Louisiana.

Russell C. Benoit, II was headed north on Louisiana Highway 3185, carrying a full load of sugar cane. The Southern Pacific train was traveling east, pulling boxcars loaded with refined sugar. At the time of the accident, there were no posted stop signs, flashing signals, lights, bells or gate arms. The only marker present was a standard cross-buck.

At the time of the accident, there were fields of sugar cane, which were standing on either side of the tracks, and which obscured the vision of Russell C. Benoit, II, as to the approaching train.

As Russell C. Benoit's cane truck entered the intersection of Louisiana Highway 3185 and Southern Pacific's railroad crossing, his cane truck was struck by the Southern Pacific train.

As a result of the above-described accident, Nick Martinolich filed suit against Southern Pacific Transportation Company, the Louisiana Department of Transportation and Development, Robert N. Figel and Daniel Underwood for damage to the tractor and trailer and for loss of use of the tractor and trailer. Subsequently, Southern Pacific Transportation Company filed suit in the United States District Court, Eastern District of Louisiana, against Nick Martinolich, Russell C. Benoit, III and American Mutual Liability Insurance Company. This suit was subsequently transferred and consolidated with the suit filed by Nick Martinolich.

Defendants/Applicants, American Mutual Liability Insurance Company, Nick Martinolich and/or Nick Martinolich, Inc. and Russell C. Benoit, II filed a Third-Party Demand against the State of Louisiana, Department of Transportation and Development, alleging that it failed to properly warn approaching motorist with regard to this particular train crossing.

On July 13, 1987, defendants/applicants, American Mutual Liability Insurance Company, Nick Martinolich and/or Nick Martinolich, Inc. and Russell C. Benoit, II attempted to depose the listed experts of the Department of Transportation and Development, Lawrence Harry and Joseph Wax. Counsel for the Department of Transportation

and Development objected to, and instructed the Department of Transportation and Development's expert witnesses not to answer any questions regarding the hazard rating system or "prioritizing" system which the Department of Transportation and Development utilizes for evaluating the need for safety enhancement at railway-highway crossings. As a result, defendants/applicants, American Mutual Liability Insurance Company,, Nick Martinolich and/or Nick Martinolich, Inc. and Russell C. Benoit, II filed a Motion to Compel requesting that the trial court issue an Order compelling the Department of Transportation and Development's experts, Lawrence Harry and Joseph Wax, to re-appear for their depositions and respond to questions concerning the hazard rating system or the "prioritizing" system employed by the Department of Transportation and Development. (A copy of defendants' Motion to Compel and Memorandum in Support Thereof is attached hereto as Exhibit 1). The State of Louisiana, Department of Transportation and Development., filed an Answer to Motion to Compel and a Memorandum Opposing the Motion to Compel (a copy of which is attached hereto as Exhibits 2A and 2B). Southern Pacific Transportation Company filed a Supplemental Memorandum in Support of Motion to Strike and/or Motion to Compel Response to Deposition Questions (a copy of which is attached hereto as Exhibit 3). Defendants also filed a Supplemental Memorandum in Support of Motion to Strike and/or Motion to Compel on behalf of Nick Martinolich and/or Nick Martinolich, Inc., Russell Benoit, II, and American Mutual Liability Insurance Company (a copy of which is attached hereto as Exhibit 4). Finally, the State of Louisiana filed a Supplemental Memorandum on behalf of the State of Louisiana opposing the Motion to Compel (a copy of which is attached hereto as Exhibit 5).

The Motion to Compel filed by defendants, American Mutual Liability Insurance Company, Nick Martinolich and/or Nick Martinolich, Inc. and Russell C. Benoit, II was submitted on briefs before the Honorable Wollen J. Falgout on the eleventh day of January, 1988. Judge Falgout denied the Motion to Compel and went further to hold that 23 U.S.C. Section 409 creates a privilege as to all information collected pursuant to the Federal Programs covered by this statute.

Defendants thereafter filed a Notice of Intention to Apply for Supervisory Writs and an Order Fixing Time Within Which Application for Supervisory Writs Shall Be Filed (a copy of each are attached hereto as Exhibits 6 and 7).

IV. *ISSUES AND QUESTIONS OF LAW PRESENTED FOR DETERMINATION*

A. Whether 23 U.S.C. Section 409 creates a privilege as to all information collected pursuant to the Federal Programs covered by this statute.

B. Whether 23 U.S.C. Section 409 in any way limits testimony regarding the identity, procedure, evaluation, or actions taken regarding the planning of safety enhancements prior to the accident of November 1, 1980 at the intersection of Louisiana Highway 3185 and Southern Pacific's railroad crossing.

C. Whether Louisiana Code of Civil Procedure Article 1422 allows for the discovery of the Department of Transportation and Development's actions prior to November 1, 1980 with regard to its evaluation of the railroad crossing at the intersection of Louisiana Highway 3185 and Southern Pacific's railroad tracks and this crossings need for additional warning signals and/or devices.

D. Whether 23 U.S. Section 409 can be afforded retroactive application so as to apply in this case.

V. *ASSIGMENTS OR SPECIFICATIONS OF ERROR*

A. The trial court acted erroneously and without legal basis in holding that 23 U.S.C. Section 409 creates a privilege as to all information collected pursuant to the Federal Programs covered by this statute.

B. The trial court was in error in denying the Motion to Compel Discovery of the Department of Transportation and Development's experts with regard to their knowledge of the actions taken by the Department of Transportation and Development prior to November 1, 1980 with regard to its evaluation of the railroad crossing located at the intersection of Louisiana Highway 3185 and Southern Pacific's railroad tracks and with regard to this crossing's need for additional warning signals and/or devices.

VI. *ARGUMENT*

Counsel for the Department of Transportation and Development bases her objection to defendants' Motion to Compel on 23 U.S.C. Section 409 which provides as follows:

> "Section 409. Admission as evidence of certain reports and surveys.
>
> Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled for the purpose of identifying (FN1) evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to Sections 130,

> 144 and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-Aid Highway Funds shall not be admitted into evidence in Federal or State Court or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data." (Copy of statute and legislative history attached as Exhibit 9).

This statute clearly and unambiguously deals with the admissibility of documentary evidence. The statute in no way limits testimony or discovery regarding the identity, evaluation or actions taken regarding planning the safety enhancement of potential accident sites. Nowhere in the statute is the word "privilege" used, and nowhere in the statute is there any suggestion that the reports and surveys discussed in the statute are undiscoverable.

Counsel for the Department of Transportation and Development has argued that "the purposes and objectives of Congress in enacting 23 U.S.C. 409 was to ensure that the information compiled by the states in identifying, evaluating and planning safety enhancements of railway-highway crossings, bridges, and the like, would not be used to defeat the purpose of the Federal-Aid Highway Funds Act. This Act was enacted in order to increase the protection of our citizens in traveling as well as to upgrade our highway systems, thus increasing efficiency, economy and our national defense." However, the statute clearly does not grant immunity to the states when they poorly or negligently identify potential safety hazards at railroad crossings. If such had been the intent of Congress in enacting 23 U.S.C. 409, Congress very easily could have stated that the states

were immune from any suit regarding its identification, evaluation and plans for safety enhancement of railway-highway crossings, bridges, and the like. Congress, in enacting 23 U.S.C. 409, also could have very easily stated in plain language that any information regarding the identification, evaluation and plans for safety enhancement of railway-highway crossings, bridges, and the like were privileged. Congress did not, however, suggest or state these objectives in enacting 23 U.S.C. 409.

In the State of Louisiana's Supplemental Memorandum Opposing Defendants' Motion to Compel, it suggests that defendants are attempting to discover the activities taken by the Department of Transportation and Development subsequent to the accident of November 1, 1980. However, defendants submit that they are only trying to identify what actions were taken by the Department of Transportation and Development prior to the accident of November 1, 1980.

In order for applicants to prove a case against the Department of Transportation and Development it is necessary to establish that the Department of Transportation and Development had prior knowledge that this was a dangerous crossing in need of additional warning signals and/or devices, but that it failed to provide same. The thrust of applicant's case against the Department of Transportation and Development is that this particular crossing had, at the time of the accident, a higher rating in terms of need for additional warning signals and/or devices than other railroad crossings which were provided with additional warning signals and/or devices. Apparently, this particular crossing was negligently overlooked and/or missed and did not get additional warning signals and/or devices when it should have. It is submitted to this Honorable Court that the Trial Judge erred in holding that 23 U.S.C. Section 409 creates a privilege as to all infor-

mation collected pursuant to the Federal Programs covered by the statute. Such a holding prohibits defendants from discovering and putting on testimony regarding the Department of Transportation and Development's actions with regard to its evaluation of this crossing and the crossing's need for additional warning signals or devices. Such a reading of the statute is to grant the Department of Transportation and Development a blanket immunity, which Congress clearly has not done.

As has been held by this Court, it is not a ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. *Hodges v. Southern Farm Bureau Cas. Ins. Co.*, 433 So.2d 125 (La. 1983); *Freeman v. Guaranty Broadcasting Corp.*, 498 So.2d 218 (La. App. 1st Cir. 1986).

With regard to the assertion of privileges, this Court has followed the interpretation by the Louisiana Supreme Court in *Conella v. Johnson*, 345 So.2d 498 (La. 1977). *Conella* involved the privilege of pending criminal litigation, LSA-R.S. 44:3. In addressing the issue of whether or not a valid privilege existed, the Supreme Court reversed the trial judge, and held that LSA-R.S. 44:3 requires more than a judicial acceptance of the prosecutor's assertion of the privilege. The Court stated that a meaningful opportunity must be afforded for a cross-examination and presentation of evidence to contradict the assertion of the privilege. If the party seeking the information in the civil action can demonstrate the inapplicability of the privilege, the records sought must be made available to him. *Freeman v. Guaranty Broadcasting Corp.*, 498 So.2d 218 (La. App. 1st Cir. 1986) citing *Conella v. Johnson, supra*.

Applicants' submit that 23 U.S.C. 409 creates no such privilege. It is further submitted that the trial court erred in accepting the bald assertion by counsel for the Department of Transportation and Development that 23 U.S.C. 409 does create such a privilege.

Finally, defendants/applicants submit to the Court that 23 U.S.C. Section 409, approved on April 2, 1987, should not be afforded retrospective application. Retrospective operation is not favored by the Courts, and a law will not be construed as retroactive unless the Act clearly, by express language of necessary implication, indicates that Congress intended retroactive application. *Nasser v. Hudson Waterways Corporation*, 563 F.Supp. 88 (D.C. Wash. 1983) citing *United States v. Whyel*, 23 F.2d 30, 32 (3d Cir. 1928), *cert. den.* 278 U.S. 664, 49 S.Ct. 178, 73 L.Ed. 570 (1928); *Arlington Coalition On Transportation v. Volpe*, 458 F.2d 1323, 1331 (4th Cir. 1972).

To avoid the unfairness often inherent in a retroactive statute, Courts will normally presume that a legislative enactment is to apply prospectively from the date of enactment. *Cox v. Schweiker*, 684 F.2d 310 (5th Cir. 1982) citing *U.S. v. Donnelly's Estate*, 387 U.S. 286, 90 S.Ct. 1033, 25 L.Ed. 2d 312 (1970); The presumption obtains unless there is an unequivocal statutory directive mandating retroactive application. *Cox v. Schweiker, supra.*, citing *Corpus v. Estelle*, 605 F.2d 175 (5th Cir.), *cert. den.*, 445 U.S. 919, 100 S.Ct. 1284, 63 L.Ed. 2d 605 (1979); *International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers v. NLRB*, 316 F.2d 373 (D.C. Cir. 1963).

Since the Department of Transportation and Development is relying on a federal statute, federal law governs the application and operation of such a law. Clearly, the above cited

federal law indicates that a federal statute is not to be given retroactive application unless Congress has clearly and unequivocally stated such an objective. Such an objective is not found in either the statute or accompanying legislative history. (Attached hereto as Exhibit 9).

VII. *JUDGMENT COMPLAINED OF*

A copy of the Judgment denying defendants' Motion to Compel signed by the Honorable Wollen J. Falgout on the eleventh day of January, 1988 is attached hereto as Exhibit 8.

VIII. *JUDGE'S REASONS FOR JUDGMENT*

The Honorable Wollen J. Falgout's reasons for judgment are incorporated in the Judgment denying defendants' Motion to Compel attached hereto as Exhibit 8.

IX. *PLEADINGS ON WHICH JUDGMENT IS FOUNDED*

Copies of the following pleadings are attached:

A. Motion to Compel on behalf of American Mutual Liability Insurance Company, Nick Martinolich, Russell Benoit, III, and Southern Pacific Transportation Company attached hereto as Exhibit 1;

B. Answer of State of Louisiana to Motion to Compel and Memorandum Opposing the Motion to Compel attached as Exhibits 2A and 2B;

C. Supplemental Memorandum in Support of Motion to Strike and/or Motion to Compel

Response to Deposition Questions attached hereto as Exhibit 3;

D. Supplemental Memorandum in Support of Motion to Strike and/or Motion to Compel on behalf of Nick Martinolich and/or Nick Martinolich, Inc., Russell Benoit, II, and American Mutual Insurance Company attached hereto as Exhibit 4; and

E. Supplemental Memorandum on behalf of the State of Louisiana Opposing the Motion to Compel attached hereto as Exhibit 5.

X. *PERTINENT MINUTES OF THE COURT*

There are no known minutes pertaining to the Judgment rendered by the Honorable Wollen J. Falgout on January 11, 1988.

XI. *SUMMARY AND CONCLUSION*

The trial court acted erroneously and without legal basis in denying defendants' Motion to Compel and in holding that 23 U.S.C. Section 409 creates a privilege as to all information collected pursuant to the Federal Programs covered by this statute.

Based on the foregoing and the Exhibits attached to this Application for Supervisory Writs, applicants, American Mutual Liability Insurance Company, Nick Martinolich and/or Nick Martinolich, Inc. and Russell C. Benoit, II pray for the following relief:

1. That an Order be issued reversing the Judgment rendered by the Honorable Wollen J. Falgout on January 11, 1988;

2. An Order compelling the Department of Transportation and Development's experts, Lawrence Harry and Joseph Wax, to re-appear for their depositions *and* respond to questions concerning the hazard rating system or the "prioritizing" system employed by the Department of Transportation and Development in its evaluation of railroad crossings;

3. An Order imposing sanctions and attorney's fees against the Department of Transportation and Development for unreasonably instructing its listed expert witnesses not to respond to defendants questions;

4. An Order assessing reasonable attorney's fees and costs incurred by defendants in re-taking the depositions of Lawrence Harry and Joseph Wax;

5. An Order that 23 U.S.C. Section 409 is not to be afforded retrospective application; and

6. Applicants further pray for all other Orders as equity may require be issued.

Respectfully Submitted,

HAILEY, McNAMARA, HALL, LARMANN & PAPALE

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Attorneys for **AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, NICK MARTINOLICH and/or NICK MARTINOLICH, INC. AND RUSSELL BENOIT, II**

AFFIDAVIT

STATE OF LOUISIANA

PARISH OF JEFFERSON

BEFORE ME, the undersigned authority, personally appeared C. KELLY LIGHTFOOT, who being duly sworn, deposed and said that he is counsel for defendants, **AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, NICK MARTINOLICH and/or NICK MARTINOLICH, INC. AND RUSSELL C. BENOIT, II** in the above numbered and entitled action, and applicants in the above and foregoing Application for Supervisory Writs; that he has prepared and read said Application and that all of the allegations contained therein are true and correct; copies of this Application were duly served upon the Honorable Wollen J. Falgout, Judge, Division "C", 17th Judicial District Court, Parish of La-Fourche, State of Louisiana, and to all counsel by placing copies in the mail, postage paid on the 26 day of January, 1988.

s/s C. Kelly Lightfoot
C. KELLY LIGHTFOOT

SWORN TO AND SUBSCRIBED
BEFORE ME, THIS 26th
DAY OF Jan.,
1988.

s/s David K. Pusons
NOTARY PUBLIC

EXHIBIT C

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 88 CW 0159

NICK MARTINOLICH

VERSUS

SOUTHERN PACIFIC TRANSPORTATION COMPANY, ET AL.

NUMBER 88 CW 0327

SOUTHERN PACIFIC TRANSPORTATION COMPANY

VERSUS

NICK MARTINOLICH, ET AL.

ON APPEAL FROM THE SEVENTEENTH JUDICIAL DISTRICT COURT, LAFOURCHE PARISH, LOUISIANA, HONORABLE W. J. FALGOUT, JUDGE.

BEFORE: EDWARDS, SHORTESS, SAVOIE, JJ.

OCT 12 1988
(stamp)

SHORTESS, J.

These consolidated cases stem from a collision which occurred on November 1, 1980, between a train owned by the Southern Pacific Transportation Company (Southern Pacific) and a sugar cane truck owned by Nick Martinolich and operated by Russell Benoit, his employee. The collision occurred in Lafourche Parish at a point where the Southern Pacific railroad tracks traverse Louisiana Highway 3185.

Southern Pacific filed suit for its damages against Martinolich, Benoit, and American Mutual Insurance Company. These defendants brought a third party demand against the State of Louisiana, Department of Transportation and Development (DOTD). Martinolich also sued Southern Pacific, DOTD, Robert Fiegel, and Daniel Underwood. In that suit Southern Pacific, Fiegel, and Underwood filed a third party demand against DOTD.

As pretrial discovery progressed, respective counsel for Martinolich and Southern Pacific deposed certain DOTD employees. During the course of the deposition of Joseph H. Wax, Deputy Undersecretary for DOTD, Wax was asked if a Mike Morgan would be the individual best able to discuss the Priority Rating System used to determine which crossings were most in need of warning devices. Counsel for DOTD objected to the question, citing 23 U.S.C. §409 as authority. After some dialogue between counsel, the witness did answer and stated that Morgan would be the individual to answer questions about priority listings. The witness was then asked if Morgan would have had that knowledge in 1979 and 1980. Counsel for DOTD then stated that she would object to any other questions that pertained to a priority list on updating railroad crossings. After additional dialogue between counsel, questioning of Wax continued until he was asked, "Who makes the decision as to whether or not safety

devices or additional safety devices, such as lights and the like, are needed at a particular crossing?" Counsel for DOTD again objected, citing 23 U.S.C. §490. The deposition was terminated. Martinolich and Southern Pacific filed a motion to compel. The trial court denied the motion and ruled that "23 USC Section 409 creates a privilege as to all information collected pursuant to the federal programs covered by this statute."

Counsel then applied for writs of prohibition, certiorari, mandamus, and review to this court. We granted a writ of certiorari and ordered briefs and oral argument because of our concern over the correctness of the trial court's interlocutory finding that 23 U.S.C. §409 created a privilege as to all information collected pursuant to the federal programs covered by the statute.

Articles 1421 through 1474 of the Code of Civil Procedure govern discovery in the courts of Louisiana. All matter that is relevant and not privileged is discoverable. LSA-C.C.P. art. 1422.

23 U.S.C. §409 provides:

> Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled for the purpose of identifying[,] evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 152 of this title or for the purpose of developing any highway saftey construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be admitted into evidence in Federal or State

> court or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.[1]

The trial court specifically determined that 23 U.S.C. § 409 created a privilege which made all information collected non-discoverable, apparently pursuant to the language of LSA-C.C.P. art. 1422.

We find that the trial court's conclusion that a privilege was created as to "all information gathered pursuant to the federal programs covered by this statute" was clearly wrong because it extends the literal wording of 23 U.S.C. §409, which enumerates, *inter alia*, reports, surveys, and data that are *compiled* for a specific purpose (compliance with either U.S.C. §§ 130, 144, or 152) to "*all information gathered*" (emphasis ours) pursuant to these programs. The trial court's holding additionally misinterpretes the effect that this statute can be allowed to have upon our Code of Civil Procedure.

23 U.S.C. §409 begins with the language "[n]otwithstanding any other provision of law . . .." The substance that follows this preface, applicable to both federal and state courts, is the regulation of evidence: "[certain documents] . . . shall not be admitted into evidence in Federal or State

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1. 23 U.S.C. §130 requires, *inter alia*, that states participating in funding thereunder survey highways to identify railroad crossings which "require separation, relocation, or protective devices, and establish and implement a schedule of projects for this purpose." 23 U.S.C. §144, similarly, requires, *inter alia*, an inventory of all highway bridges "on any Federal-aid system . . . [and] assign each a priority for replacement or rehabilitation . . .." 23 U.S.C. §152 requires that participating states survey "all public roads to identify hazardous locations . . . and implement a schedule of projects for their improvement.

court or considered for other purposes . . .." Insofar as this statute applies to the function of state courts conducting their business–it is preemptive.

The United States Constitution provides for preemption. The supremacy clause empowers Congress,[2] within constitutional limitations, to supersede state law. *Hillsborough County Florida v. Automated Medical Laboratories, Inc.*, 105 S.Ct. 2371, 2375 (1985). Where, as here, the intrusion is into an area traditionally occupied by the states, Congress' intent to preempt must be clear. *Jones v. Rath Packing Co.*, 97 S.Ct. 1305, 1309 (1977). When the possibility of intrusion into a field traditionally left to the states is perceived, there exists a presumption that the states' laws remain valid. *Rath Packing Co.*, 97 S.Ct. at 1309 ("[W]e start with the assumption that the historic police powers of the states were not to be superseded . . . unless that was the clear and manifest purpose of Congress" [citation omitted]); *Automated Medical Laboratories*, 105 S.Ct. at 2376 (noting the presumption that state regulation of health and safety concerns is not superseded by congressional action.)

A state's regulation of its court system is in our opinion as fundamental a function of its sovereignty as the normal exercise of its police power even in matters concerning the health and safety of its citizens. Congress' intrusion, in this instance, however, is constitutionally permissible because Louisiana's participation in the federal funding scheme is voluntary; because the improvement of state highways with

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2. The supremacy clause provides, in pertinent part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme law of the land . . .." U.S. Const. Art. VI, cl. 2.

federal funds is in pursuit of "[providing] for the general welfare" as provided in U.S. Const. Art. I, §8, cl. 1 ("spending power"); because it is clear that participation in the funding program requires acquiescence to the intrusion; and, finally, because the intrusion is related to a valid federal interest (inasmuch as 23 U.S.C. §409 encourages participation in a scheme that ensures, by prioritization, deliberative spending of federal funds). *South Dakota v. Dole*, 107 S.Ct. 2793, 2796 (1987).[3]

Having concluded that 23 U.S.C. § 409 operates to supersede rules governing a fundamental state function,[4] we must

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3. *South Dakota v. Dole*, 107 S.Ct. 2793, 2796 (1987) addressed conditioned federal funding under Title 23, specifically 23 U.S.C. 158 (the mandatory drinking age requirement) and the constitutional limitation on conditioned funding under the spending clause:

> [T]he exercise of the spending power must be in pursuit of "the general welfare.. . . ." Second, we have required that if Congress desires to condition the States' receipt of federal funds, it "must do so unambiguously . . ., enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation.. . ." " Third, our cases have suggested (without significant elaboration) that conditions on federal grants might be illegitimate if they are unrelated "to the federal interest in particular national projects or programs."

(Citations omitted). 107 S.Ct. at 2796. *See also Florida v. Mathews*, 526 F.2d 319 (5th Cir. 1976) (noting that conditions imposed on voluntary state participation in funding programs does not infringe upon state sovereignty preserved by the tenth amendment).

4. *See Patterson v. New York*, 97 S.Ct. 2319, 2322 (1977) (noting the deference to be accorded state procedure in state courts, including matters such as the burden of producing evidence and the burden of persuasion).

now address the extent of the preemption. Clearly Congress has not endeavored, by way of this statute, to occupy the field of Louisiana's evidentiary rules or our Code of Civil Procedure. Where Congressional enactments do not exclude all state legislation in the field, preemption is to the extent of the conflict between them. *Rath Packing Company*, 97 S.Ct. at 1310. To determine the extent of the conflict, we are directed to consider the relationship between our rules of evidence and procedure, and 23 U.S.C. §409. *Id.* Because preemption is not presumed, we construe 23 U.S.C. § 409 restrictively, to intrude only so much as Congress has expressly prescribed. *See Ruth Packing Co.*, 97 S.Ct. at 1309. To determine the intent of Congress, we turn to the federal rules of statutory construction. *See U.S. v. Lemaire*, 826 F.2d 387 (5th Cir. 1987). (holding that the term "final judgment" in 12 U.S.C. § 91 is to be defined according to federal law, notwithstanding that it refers to a judgment in state court); *see also Gary v. State of Louisiana*, 441 F. Supp. 1121 (E.D. La. 1977), *aff'd*, 622 F.2d 804 (5th Cir. 1980), *cert. denied*, 101 S.Ct. 1695 (1981). (holding that although Federal Rule of Civil Procedure 69 provides for execution of judgment according to the "practice or procedure" of the state in which the district court is held, federal, not state, statutory exemptions govern.)

The proscription in 23 U.S.C. § 409 is "shall not be admitted into evidence . . . or considered for other purposes . . .." The meaning of "shall not be admitted into evidence . . .." is abundantly clear. We need look no further to discern Congress' intent. *American Trucking Associations, Inc. v. Interstate Commerce Commission*, 659 F.2d 452, 459 (5th Cir. 1981).

The meaning of "or considered for other purposes . . ." is not clear. There is a presumption that the legislature intended the plain meaning of the words it chose. *Louisiana*

ex rel Guste v. United States, 656 F. Supp. 1310, 1315 (W.D. La. 1986). The indended effect of this phrase, however, is not self-evident. The documents made inadmissible by 23 U.S.C. §409 are not "all information gathered . . ." as the trial court held, but rather "reports, surveys, schedules, lists or data compiled . . .." This enumeration suggests something more than simple factual information that DOTD has gathered. These documents may reflect mental impressions, conclusions, and opinions of DOTD representatives regarding a survey of railroad grade crossings in need of "separation, relocation, or protective devices . . . ," if compiled in compliance with 23 U.S.C. § 130; or mental impressions, conclusions, and opinions of DOTD representatives regarding "hazardous locations, sections, and elements . . . [to be assigned] priorities for the correction of such . . . and [for the implementation of] a schedule of projects for their "improvement," is compiled in compliance with 23 U.S.C. § 152. This is similar to the kind of documentary evidence assembled by expert witnesses that is not subject to discovery under Rule 26 of the Federal Rules of Civil Procedure or under our Code of Civil Procedure.[5] Fed. R. Civ. Pro. 26; *See also* LSA-C.C.P. art. 1424; *Louisiana Department of Transportation and Development v. Stumpf*, 458 So.2d 448 (La. 1984).

The phrase "considered for other purposes . . .," preceded by language referring to admissibility of evidence, implies a finder of fact. A finder of fact *considers* testimony and documentary evidence. We believe that the catch-all phrase was meant to include *any other trial use* of the enumerated documents; that is to say, that for purposes of the finder of fact, the documents prohibited by 23 U.S.C. §409

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5. Louisiana's rules of discovery are, in fact patterned after and do not substantially differ from the federal rules. *Ogea v. Jacobs*, 344 So.2d 953, 957 (La. 1977).

do not exist. They may not be referred to by counsel, and they may not be used for impeachment purposes. They are, however, discoverable, if not otherwise prohibited by LSA-C.C.P. art. 1422, which specifically provides that "[i]t is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."[6]

We say this mindful that privileges are the exceptions to and in derogation of the system by which we determine the truth, and cannot be lightly created or expansively construed. *United States v. Nixon*, 94 S.Ct. 3090 (1974). We are additionally aware of the fundamental objectives of Louisiana's discovery process and the liberal construction that articles 1421 through 1474 of the Code of Civil Procedure are to be afforded in order to attain these objectives. *Hodges v. Southern Farm Bureau Casualty Insurance Company*, 433 So.2d 125 (La. 1983). The reports, surveys, data, schedules, and lists collected pursuant to 23 U.S.C. §§ 130, 144, and 152, made inadmissible by 23 U.S.C. § 409, are not privileged within the meaning of LSA-C.C.P. art. 1422, and 23 U.S.C. § 409 does not displace our Code of Civil Procedure so as to make them privileged.

Our interpretation of the scope of 23 U.S.C. § 409 is analogous to interpretation by the Eighth Circuit of a Nebraska statute requiring the county coroners to submit a report to the state Department of Motor Vehicles where a driver of a vehicle dies within four hours of a motor vehicle accident. Neb. Rev. Stat. §§ 39-6, 104.07; *Blackledge v. Martin*

6. The documents are *inadmissible* by operation of 23 U.S.C. § 409; therefore, it is incumbent upon the parties seeking to discover them to show that the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

K. Eby Construction Company, Inc., 542 F.2d 474, 475 (8th Cir. 1976). The statute required the coroner, in such an instance, to test for and determine the percentage of alcohol in the body of the deceased. *Id.* A related statute provided that neither the report submitted by the coroner nor any statement contained therein "shall be made available for any purpose in any trial arising out of the accident . . .." Neb. Rev. Stat. §§ 39-6, 104.10; *Blackledge*, 542 F.2d at 476. The court concluded that, in the facts before it, evidence of a motor vehicle accident victim's blood alcohol content was admissible notwithstanding the exclusionary statute because the examination had been made in the "ordinary course of an autopsy ordered by the acting Coroner of Douglas County and not for purposes of any report to be submitted to the Department of Motor Venicles." *Id.* We suggest this distinction, by analogy, is appropriate in determining the ambit of 23 U.S.C. § 409.

Finally, we address the retroactive application of 23 U.S.C. § 409. The statute was added to Title 23 by Pub. L. No. 100-17, 100 Stat 170 (1987). The collision occurred in 1980. The suits were filed in 1981 and 1982, respectively.

Bradley v. School Board of Richmond, 94 S.Ct. 2006 (1974), requires retroactive application of a change in the law in the absence of legislative mandate to the contrary or unless such application would cause manifest injustice. *LTV Federal Credit Union v. UMIC Government Securities*, 704 F.2d 199, 202 (5th Cir. 1983); *see also Cort v. Ash*, 95 S.Ct. 2080, 2087 (1975). There is no congressional mandate that 23 U.S.C. § 409 apply prospectively only. Under the construction we give 23 U.S.C. § 409, private litigants will be deprived of certain evidence but not a cause of action. *Cf. California Cartage Company, Inc. v. United States*, 802 F.2d 353 (9th Cir. 1986) (where retroactive application of a statute deprived litigants of standing to sue). We do not

accept the contention that applicants will now be unable to prove DOTD's knowledge of a defective condition, if such is the case. In this regard, the right to introduce these documents into evidence, if it be a right, is not one that has become unconditional such that deprivation of this evidence will work manifest injustice on the litigants. *LTV Federal Credit Union*, 704 F.2d at 203. Moreover, the value of the right to introduce this evidence at trial is contingent upon a variety of other contingencies–the outcome of all of which is uncertain. *See California Cartage*, 802 F.2d at 357. We conclude that manifest injustice will not result from the retroactive application of 23 U.S.C. § 409. *See also Anderson v. Anderson*, 520 So.2d 1236 (La. App. 5th Cir.), *writ denied*, 521 So.2d 1187 (La.1988) (citing *Bradley*, 94 S.Ct. 2006, to support the retroactive application of 10 U.S.C. § 1408, the "Federal Uniformed Services Former Spouse Protection Act," so as to allow state courts to consider military pension benefits when determining property rights between parties to a divorce).

For the reasons set forth above, we give 23 U.S.C. § 409 restrictive interpretation. The documents prohibited by § 409 do not exist for the fact finder, and relators in pursuing pretrial discovery are permitted a scope of discovery limited only by the statutory language of LSA-C.C.P. arts. 1422-1425.

All costs of these applications, amounting to $8,254.75,[7] are taxed to DOTD. Attorney fees for Martinolich's and Southern Pacific's counsel are fixed at $2,000.00 each.

INTERLOCUTORY RULING VACATED, AND WRIT MADE ABSOLUTE.

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7. Costs of suit number 88 CW 0159 are $6,967.69, and costs of suit number 88 CW 0327 are $1,287.06.

EXHIBIT D

SUPREME COURT
OF THE
STATE OF LOUISIANA

DOCKET NO.

NICK MARTINOLICH

VERSUS

SOUTHERN PACIFIC
TRANSPORTATION COMPANY, ET AL

CONSOLIDATED WITH

SOUTHERN PACIFIC
TRANSPORTATION COMPANY

VERSUS

NICK MARTINOLICH, ET AL

OPPOSITION TO APPLICATION FOR WRIT OF CERTIORARI, OR REVIEW, ON BEHALF OF AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, NICK MARTINOLICH and/or NICK MARTINOLICH, INC., and RUSSELL C. BENOIT, II FROM THE COURT OF APPEAL, FIRST CIRCUIT, PARISH OF LAFOURCHE

CIVIL PROCEEDING

Respectfully Submitted,

HAILEY, McNAMARA, HALL,
LARMANN & PAPALE

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The above captioned matter is brought before this Honorable Court on a writ of certiorari, or review, by the State of Louisiana through the Department of Transportation and Development. The writ application has been brought by the Department of Transportation and Development in response to the Judgment of the First Circuit Court of Appeal rendered on October 12, 1988. The issue before the Trial Court, Court of Appeal, and this Honorable Court, involves the interpretation of 23 U.S.C. Section 409 which provides:

> Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled for the purpose of identifying[,] evaluating, or planing the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossing, pursuant to Sections 130, 144, and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing federal-aid highway funds shall not be admitted into evidence in Federal or State Court or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data."

Counsel for American Mutual Liability Insurance Company, the Martinolich interests, and Russell Benoit, II submit that the First Circuit Court of Appeal correctly determined that the trial court clearly erred in finding that 23 U.S.C. Section 409 created a privilege which made all information collected non-discoverable. The Court of Appeal issued an eleven page opinion which fully addresses the issues of construction, interpretation and application of the federal statute in question. As pointed out by the Court of Appeal,

"the documents made inadmissible by 23 U.S.C. Section 409 are not 'all information gathered . . .' as the trial court held, but rather 'reports, surveys, schedules, lists or data compiled . . .' ". As urged in the original brief filed on behalf of American Mutual Liability Insurance Company, the Martinolich interests, and Russell Benoit, II with the First Circuit Court of Appeal, 23 U.S.C. Section 409 clearly and unambiguously deals with the admissibility of documentary evidence. The statute in no way limits testimony or discovery regarding the identity, evaluation or actions taken regarding planing the safety enhancement of potential accident sites. Nowhere in the statute is the word "privileged" used and nowhere in this statute is there any suggestion that the reports and surveys discussed in the statute are not discoverable.

The State of Louisiana, through the Department of Transportation and Development, continues to suggest that American Mutual Liability Insurance Company, the Martinolich interests, and Russell Benoit, II are attempting to discover the activities taken by the Department of Transportation and Development subsequent to the accident of November 1, 1980 in order to establish that a hazardous and negligent condition existed on the date of the accident. As was pointed out in the brief filed with the Court of Appeal, American Mutual Liability Insurance Company, the Martinolich interests, and Russell Benoit, II are only trying to identify what actions were taken by the Department of Transportation and Development *prior to* the accident of November 1, 1980 in order to establish that the Department of Transportation and Development had prior knowledge that this was a dangerous crossing in need of additional warning signals and/or devices, but failed to provide same. Further, American Mutual Liability Insurance Company, the Martinolich interests, and Russell Benoit, II are not trying to establish what actions were taken by the Department of Transportation and

Development prior to the accident in order to prove that a negligent or hazardous condition existed because these actions were taken by the Department of Transportation and Development, rather, the information is being sought to establish that the Department of Transportation and Development was negligent in its procedure for evaluating railway-highway crossing and, therefore, this particular crossing failed to receive the proper additional warning signals, devices, etc., when it should have.

IT IS FURTHER SUBMITTED that the Court of Appeal correctly found that "the reports, surveys, data, schedules, and lists collected pursuant to the 23 U.S.C. Section 130, 144, and 152, made inadmissible by 23 U.S.C. Section 409, are not privileged within the meaning of LSA-C.C.P. Art. 1422, and 23 U.S.C. Section 409 does not displace our Code of Civil Procedure as to make them privileged." It is submitted that the discovery of the information in the possession of the Department of Transportation and Development with regard to this particular crossing is reasonably calculated to lead to the discovery of information which will establish that the Department of Transportation and Development was negligent in its evaluation of this particular crossing which information will be admissible. Therefore, It is submitted that the discovery sought by American Mutual Liability Insurance Company, the Martinolich interests, and Russell Benoit, II is reasonably calculated to lead to the discovery of admissible evidence.

WHEREFORE, American Mutual Liability Insurance Company, Nick Martinolich and/or Nick Martinolich, Inc. and Russell Benoit, II pray that the application of the State of Louisiana through the Department of Transportation and Development for certiorari, or review, be denied and that the judgment of the First Circuit Court of Appeal be affirmed.

Respectfully Submitted,

HAILEY, McNAMARA, HALL, LARMANN & PAPALE

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CERTIFICATE OF SERVICE

I do hereby certify that I have on this 22 day of November, 1988, served a copy of the foregoing pleading on counsel for all parties to this proceeding by mailing the same by United States mail, properly addressed and first class postage prepaid.

s/s C. Kelly Lightfoot

EXHIBIT E

THE SUPREME COURT OF THE STATE OF LOUISIANA

NO. 88-C-2769

NICK MARTINOLICH
VS
SOUTHERN PACIFIC TRANSPORTATION COMPANY,
et al

C/W

SOUTHERN PACIFIC TRANSPORTATION COMPANY
VS
NICK MARTINOLICH, et al

IN RE: Transportation & Dev. Dept. of: - Defendant(s); Applying for Writ of Certiorari and/or Review; to the Court of Appeal, First Circuit, Number CW88 0159, CW88 0327; Parish of Lafourche 17th Judicial District Court Div. "C" Number 44698, 46788

January 6, 1989

Denied.

LFC
PFC
JLD
JCW

MARCUS & LEMMON, JJ., would grant the writ.

Supreme Court of Louisiana
January 6, 1989

s/s Francis J. Labranch, Jr.
Clerk of Court
For the Court